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No. 90 ___

In The

Supreme Court of the United States

October Term, 1990

ESTATE OF ANDREW P. CARTER, Through Its Dative Testamentary Executor, Eugene G. Taggart,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are valuation principles established in *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929), violated when a life estate is deemed worthless on the basis of knowledge of a life tenant's mortality acquired only after the instant of the transferor's death?

2. May the Internal Revenue Service refuse to apply actuarially based valuation of a life estate in order to use fair market valuation when its own regulations proscribe this change?

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UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner Estate of Carter respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 11, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 921 F.2d 63 (5th Cir. 1991), and is reprinted in the appendix hereto, p. App. 1, *infra*.

The memorandum opinion of the United States District Court for the Eastern District of Louisiana (Livaudais, M.) is unofficially reported at 91-1 USTC ¶ 60,003 (E.D. La. 1989). It is reprinted in the appendix hereto, p. App. 13, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1346(a)(1), the petitioner brought this suit in the Eastern District of Louisiana. On December 14, 1989, the Eastern District granted petitioner's motion for summary judgment.

On respondent's appeal, the Fifth Circuit on January 11, 1991, entered a judgment and an opinion reversing the Eastern District's grant of summary judgment and rendered judgment in the government's favor. See p. App. 13, *infra*.

Petitioner sought rehearing, and, on March 15, 1991, the Court of Appeals denied the petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. See p. App. 22, *infra*.

This Court's jurisdiction to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

Excerpts from the following statute are reprinted in the appendix hereto: 26 U.S.C. § 2013.

Excerpts from the following relevant regulations are reprinted in the appendix hereto: 26 C.F.R. §§ 20.2013-4, "Valuation of property transferred;" 20.2031-1, "Definition of gross estate; valuation of property;" 20.2031-7, "Valuation of annuities, life estates, terms for years, remainders, and reversions for estates of decedents dying after November 30, 1983;" and 20.2031-9, "Valuation of other property."

STATEMENT OF THE CASE

This petition involves the valuation of a Louisiana usufruct[1] inherited by Mr. Carter from Mrs. Carter as a result of their deaths in an automobile accident on May 23, 1987. Because no facts existed to determine the order of their deaths, the Louisiana doctrine of *commorientes* (survivorship) was utilized,[2] and Mr. Carter was deemed to have survived Mrs. Carter. After federal estate taxes were paid by each estate, the Estate of Andrew P. Carter (Estate) sought a tax refund on the basis of the tax on prior transfer (TPT) credit afforded by section 2013 of the Internal Revenue Code of 1986, 26 U.S.C. § 2013 (1989).

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[1] Louisiana Civil Code article 535 defines a usufruct as "a real right of limited duration on the property of another."

[2] Louisiana Civil Code articles 936-38 contain the statutory presumptions regarding survivorship.

When no refund was provided by the Internal Revenue Service (IRS), the Estate filed suit in the United States District Court for the Eastern District of Louisiana.

In the district court, both the Estate and government agreed to the submission of a stipulation of uncontested facts and filed cross motions for summary judgment. The district court, giving effect to both federal and state law, decided the case in favor of the Estate, holding that at the moment of Mrs. Carter's death, no one knew or could have known whether Mr. Carter would survive, or for how long. The United States District Court for the Eastern District of Louisiana held that, as a consequence of Supreme Court precedent in *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929), actuarial valuation was the appropriate method for estate tax valuation of the usufruct. The government appealed.

The Court of Appeals for the Fifth Circuit reversed. In so doing, the appellate court attempted to distinguish *Ithaca Trust*:

> This case is unlike *Ithaca Trust*. In this case, it was known at the time of the transfer that Mr. Carter was already dead or would soon die. At the moment of Mrs. Carter's death, Mr. Carter's death was not an 'uncertain probability,' as was the death in *Ithaca Trust*, where the life tenant died six months after the transfer. In fact, it is only by operation of the fiction established by state law (article 938) that we deem Mr. Carter to have survived Mrs. Carter for a few seconds or minutes. The truth – which will never be known – could just as likely be that he predeceased her or that they died simultaneously.

Est. of Carter v. United States, 921 F.2d 63, 67 (5th Cir. 1991). The appellate court found that the government was entitled to depart from actuarial valuation in order to consider the "facts" of this case and to conclude that the usufruct was valueless.

The appellate court relied principally on appellate court and tax court precedent, namely *Estate of Lion v. Commissioner*, 438 F.2d 56 (4th Cir.), *cert. denied*, 404 U.S. 780 (1971), and *Estate of Marks v. Commissioner*, 94 T.C. 720 (1990). In so doing, it distinguished its own precedent (and that of its successor, the Eleventh Circuit) in *Estate of Wien v. Commissioner*, 441 F.2d 32 (5th Cir. 1971). It ruled that its previous decision, which held that valuation of a life insurance policy in the case of a simultaneous death must be based on actuarial principles, did not bind the court in a non-insurance case. The appellate court purported to find support for its disregard of *Ithaca Trust* in *United States v. Provident Trust Co.*, 291 U.S. 272 (1934). This was a case in which the determination of the value of a charitable remainder contingent upon the life tenant's not having any issue was affected by knowledge of the life tenant's hysterectomy several years before the testator's death.

The appellate court recognized that valuation of the usufruct (or life estate) created by state law upon the death of Mr. and Mrs. Carter in a common accident must, under federal regulations, be based on "recognized valuation principles." It ruled, however, that such principles

"*include* but are not *limited* to the use of actuarial tables."[3] 921 F.2d at 66.

The appellate court did not identify any market in which the fair market value of a usufruct could be determined under section 20.2031-1(b) of Title 26 of the Code of Federal Regulations. Nonetheless, the appellate court ruled that it would "opt instead to apply the maxim that certainty should be deemed a 'recognized valuation principle.' " 921 F.2d at 68. On March 15, 1991, the appellate court denied rehearing.

REASONS FOR GRANTING THE WRIT

Notwithstanding the appellate court's effort to limit its decision to circumstances in which a transferor and transferee die in a common disaster, the implications of this decision are more far reaching. The decision affects any case in which the IRS makes valuation determinations based upon post-mortem knowledge of facts that were not known or could not have been known at the instant of death. It permits the IRS to depart from its own established valuation procedures, found in its regulations at 26 C.F.R. § 20.2031, whenever the IRS believes that the situation presents an "exceptional" case. In sum, the decision threatens the rule of law in tax cases in general and the continued viability of *Ithaca Trust* in particular.

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[3] The appellate court also specifically rejected the proposition that "recognized valuation principles" are those contained in and explicated in section 20.2031 of the Estate Tax Regulations. 921 F.2d at 66 n.6.

At the heart of this case are two issues. The first issue focuses on what is known as certain about the longevity of the transferee at the very instant of the transferor's death in a common disaster. According to the appellate court, whenever a usufruct (or life estate) is transferred under a state statute establishing a presumption that the transferee outlived the transferor dying in a common accident, that interest is totally valueless: notwithstanding *Ithaca Trust*, the death of the transferee will be deemed to be known as a fact certain at the instant of the death of the transferor.

The second issue focuses on the applicability of the valuation regulations. According to the challenged opinion, the "maxim of certainty" was accepted as a recognized valuation principle that could be utilized in lieu of actuarial valuation established by IRS regulation. That conclusion fails to recognize that the "maxim of certainty" is a fact-based valuation principle established in section 20.2031-1 of the IRS regulations that cannot be applied to valuation of a life estate unless the life estate is incapable of actuarial valuation. In failing to recognize the regulatory scheme affecting valuation of life estates, the appellate court adopted an improper valuation methodology.

I. The Fifth Circuit decision adopts valuation based upon an impermissible reliance on knowledge acquired only after the instant of valuation has passed.

Although its opinion attempts to avoid the principles established in *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929), by distinguishing this case on its facts, the Fifth

Circuit decision in this matter directly conflicts with *Ithaca Trust*. In *Ithaca Trust*, a widow had died six months after the creation of a life estate in her favor. At issue was the valuation of the diminution in the decedent's estate attributable to the creation of the life estate. The question, as stated by Justice Holmes, was whether "the amount of the diminution . . . is to be determined by the event as it turned out, of the widow's death within six months, or by the mortality tables showing the probabilities as they stood on the day when the testator died." *Id.* at 155.

This Court held: "Tempting as it is to correct uncertain probabilities by the now certain fact, we are of the opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables." *Id.* The instant appellate opinion, succumbing to this temptation, embodies the thinking rejected by Justice Holmes in his opinion for the Court in *Ithaca Trust*.

The consequence of this inaccurate thinking is to permit the IRS to create a vague and unauthorized exception to this Court's decision in *Ithaca Trust*. The IRS' own exception is set forth in the Revenue Ruling that the government deemed applicable to this case:

> the current actuarial tables in the regulations shall be applied if valuation of an individual's life interest is required for purposes of the federal estate or gift taxes unless the individual is known to have been afflicted at the time of transfer with an incurable physical condition that is in such an advanced stage that death is clearly imminent.

Rev. Rul. 80-80, 1980-1 C. B. 194, 195. Although the common disaster exception recognized by the appellate court

is not equally broad, by recognizing that the IRS can decline to apply *Ithaca Trust* in this case the Fifth Circuit has given the IRS continued license to eat away at the *Ithaca Trust* decision without approval by this Court.

Under *Ithaca Trust*, valuation of a life estate in the context of federal estate taxation may not be determined by post-mortem reliance upon the certain fact of the life tenant's actual mortality. Instead, valuation must occur at the moment of the testator's death and, because of the uncertainty of the life tenant's mortality *at that instant*, the mortality tables established by government regulations must be utilized, even though those probabilities are subsequently known to defy reason and fact. It is clear that *Ithaca Trust* turns on what is known as certain fact at the instant of the testator's (here, the transferor's) death.

The Fifth Circuit's opinion is unfaithful to the *Ithaca Trust* principle of valuation at the time of death. While it states that Mr. Carter's (the transferee) death was a certain fact at the moment of Mrs. Carter's (the transferor) death, there is absolutely no factual evidence to support that conclusion. What the appellate court states as a fact is actually a mere assumption made to obscure the inconsistency of its opinion with *Ithaca Trust*.

The appellate court, in fact, admits that the truth, *i.e.*, the *actual facts* of Mr. Carter's mortality, at the instant of Mrs. Carter's death, can never be known. The court's speculation that Mr. Carter could have predeceased Mrs. Carter, or died simultaneously, fails to acknowledge the third possibility adopted as the relevant truth by state law – that Mr. Carter survived Mrs. Carter. It fails to

acknowledge the very human possibility that Mr. Carter survived the crash, but died when the vehicle erupted into flames because he would not leave Mrs. Carter alone in the car.

The government's position is that since the presumption of survivorship was applied, it was actually known at the time of Mrs. Carter's death that Mr. Carter would not survive for very long and that this fact affects valuation. But the truth is that nothing was actually known at the instant of Mrs. Carter's death about Mr. Carter's condition. To subsequently infer from Mr. Carter's death that it was a certainty at the time of Mrs. Carter's death that Mr. Carter would die shortly thereafter is to use knowledge gained after the time of Mrs. Carter's death. It is also to deny real effect to the state law presumption under color of valuation in contravention of *Ithaca Trust*. Valuing the usufruct at zero, as if it never existed, negates the fact that, under state law, a usufruct was transferred to Mr. Carter as a result of Mrs. Carter's death.

Ironically, the previous decision of the United States Court of Appeals in *Estate of Wien v. Commissioner*, 441 F.2d 32 (5th Cir. 1971), was soundly grounded in *Ithaca Trust*. Although the appellate court distinguished *Wien*, it is not distinguishable on the basis of any legal principle consistent with *Ithaca Trust*. In *Wien*, a husband and wife died in a plane crash under circumstances in which the order of death could not be ascertained. The Georgia survivorship statute applied, and Mr. Wien was presumed to have survived Mrs. Wien. The issue in *Wien* involved valuation of life insurance policies for estate tax purposes, and the "imminence" of Mr. Wien's death was

a focal point for the valuation issue. In *Wien*, the Fifth Circuit held

> at the moment of Mrs. Wien's death, *no one knew or could have known whether Mr. Wien would survive or not* . . . . Both the Commissioner and the taxpayers of necessity *took a post mortem look* and determined that the insured [Mr. Wien] did die, *a fact which no buyer at the instant of the owner's* [Mrs. Wien] *death could have known.*

Id. at 40 (emphasis added).[4]

The principle of *Ithaca Trust* specifically forbids such post mortem looks. This Court's decision in *Ithaca Trust* and the Fifth Circuit's previous decision in *Wien* (presumably still the applicable precedent of the successor Eleventh Circuit) are flatly inconsistent with the holding in *Estate of Lion* and several Tax Court decisions upon which the government and the Fifth Circuit's opinion in this matter heavily rely.

Perhaps the most obvious statement of this inaccurate thinking comes from the Fifth Circuit opinion in this case wherein the court stated:

> Thus, the phrase 'recognized valuation principles' includes examination of *facts known about*

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[4] The Fifth Circuit facilely dismisses *Wien* in footnote 4 of its opinion. What that court does not address is why a hypothetical buyer cannot know whether or not Mr. Wien would survive the plane crash at the instant Mrs. Wien died, and yet know that Mr. Carter was already dead or would soon die in the auto crash at the instant Mrs. Carter died. This makes no sense unless a hypothetical buyer of insurance policies is somehow different from and less knowing than the hypothetical buyer of life estates, a proposition that is both intuitively and empirically absurd. The fact is that the "hypothetical buyer" methodology of valuation, *i.e.*, fair market valuation, established in 26 C.F.R. § 20.2031-1, is equally inapplicable to both situations.

> *the transferee at the time of the transferor's death* . . . . In fact, it is only by operation of the fiction established in state law (article 938) that we deem Mr. Carter to have survived Mrs. Carter for a few seconds or minutes. The *truth – which will never be known* – could just as likely be that he predeceased her or that they died simultaneously.

921 F.2d at 67 (emphasis added). The appellate court thus admits that the truth of Mr. Carter's actual life expectancy was not known at the moment of Mrs. Carter's death, and, therefore, *at that instant* there were no certain facts upon which to rely.

Succumbing to the temptation cautioned against in *Ithaca Trust*, the appellate court used knowledge of fact acquired after the moment of valuation to make the valuation decision. The court's analogy to predicting yesterday's weather demonstrates the point perfectly. Hindsight is always 20/20 and all facts (whether about yesterday's weather or the transferee's mortality) were known with certainty only after the time for their prediction had long passed. If the instant when valuation occurs is the time of the *transferee's* death, the "maxim of certainty" would always apply since no prediction (probabilities) would be involved. The law, however, provides that the instant of valuation is the *transferor's* death when *Ithaca Trust* establishes that the life tenant's mortality must be based on probabilities. The appellate court's decision is thus unavoidably inconsistent with *Ithaca Trust* because this Court's applicable decision requires that valuation of the decedent's estate in the circumstances here present be made on the basis of what is

actually known at the time of the transferor's death, not what becomes known at some later point in time.

II. The Fifth Circuit decision improperly approves IRS departure from the valuation procedure mandated in its regulations.

The appellate court's opinion in this case misconstrues the applicable regulations involved in the valuation of the usufruct (or life estate) inherited by Mr. Carter. The court read the duly-promulgated IRS regulations published at 26 C.F.R. § 20.2013-4(a) to permit departure from application of the actuarial table found in section 20.2031-7 and observed that, had the regulation's drafters intended to require use of the valuation regulations in section 20.2031, they could have easily said so.

The fact is they initially did.[5] The history of sections 20.2013 and 20.2031 demonstrates that the section 20.2031 regulations are the "recognized valuation principles" referred to in section 20.2013-4(a). In comparing the proposed (1956) and final (1958) regulations, the interdependence of the section 20.2013 and 20.2031 regulations is apparent. The central focus of both sets of regulations is

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[5] See pp. App. 31-2., *infra*, to contrast the language between proposed regulations published in 1956, 21 Fed. Reg. 7857, 7858 & 7870 (Oct. 16, 1956), and final regulations published in 1958, 23 Fed. Reg. 4536, 4537 & 4549 (June 24, 1958). A comparison indicates the drafters intended the regulations be read *in pari materia* and as a whole scheme.

not whether section 20.2031 (containing the estate tax valuation regulations) is pertinent to section 20.2013-4(a) (containing the valuation scheme for TPT credit purposes). It is quite simply assumed that section 20.2031 is indeed pertinent. The changes in language, reflecting this interdependence, focus on the narrow problem that some life estates are incapable of actuarial valuation.[6] For this reason:

(1) the phrase "recognized *actuarial* principles" originally appearing in section 20.2013-4(a) was changed to "recognized *valuation* principles" (emphasis supplied);

(2) "see § 20.2031-7" was changed to "see *especially* § 20.2031-7" (emphasis supplied); and

(3) part of the last sentence of section 20.2013-4(a) referring to those interests incapable of actuarial valuation was moved to section 20.2031-9 in order that such interests would not be given a zero value automatically, as originally proposed, but would be valued according to the facts of that specific situation pursuant to section 20.2031-1(b).

Although the final regulations permitted departure from use of actuarial valuation of life estates, the permissible departure was restricted by the provisions of section 20.2031-9, which acquired language originally appearing in section 20.2013-4(a).

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[6] A future interest in property cannot be valued by use of actuarial tables when, for example, there is vast discretion in the hands of a trustee. *Holbrook v. United States*, 575 F.2d 1288 (9th Cir. 1978); *Boryan v. United States*, 690 F. Supp. 459 (E.D. Va. 1988), *aff'd*, 884 F.2d 767 (4th Cir. 1989).

The appellate court misconstrued the regulations when it failed to recognize, as it had recognized in *Miami Beach First National Bank v. United States*, 443 F.2d 116, 120 (5th Cir. 1971), that departure from actuarial valuation to "actual" or "certain" fact was a departure from section 20.2031-7 containing the actuarial tables to section 20.2031-1(b) where consideration of relevant fact is required. That departure, however, is limited by section 20.2031-9, which mandates application of the actuarial tables in section 20.2031-7 unless the limited interest property is incapable of actuarial valuation. Only then may the departure to section 20.2031-1(b) – "certain" fact – be used.

Petitioner's position, simply stated, is that one must analyze the reasoning of the appellate court against an *in pari materia* reading of sections 20.2013-4, 20.2031-1, 20.2031-7 and 20.2031-9 of Title 26 of the Code of Federal Regulations and only then do the implications of that opinion and its tensions with the regulations become apparent. What does the appellate court's "maxim that certainty should be deemed a 'recognized valuation principle' " actually mean in the context of the regulations? The appellate court's maxim can only mean that no disinterested purchaser would pay anything for the value of Mr. Carter's usufruct. The maxim is an apparent application of the principle of "fair market value."

However, according to section 20.2031-1(b), the fair market value of property is not to be determined by its sale price in any market other than one in which such item is most commonly sold to the public. The appellate court has pointed to no such market for life estates or usufructs because the record does not reflect the existence

of any such market. There is, in fact, no such market: "[T]he regulations require these interests to be valued by reference to actuarial tables and a prescribed interest factor, since they are not bought and sold in arm's-length transactions (except in nineteenth century British novels)." 5 B. I. Bittker, *Federal Taxation of Income, Estates and Gifts* § 132.1.2 (1984).

The property at issue is within the description set forth in section 20.2031-7, *i.e.*, a Louisiana usufruct is a *life estate* within the meaning of the regulations.[7] Section 20.2031-9 means that the actuarial tables are to be used to value limited interest property unless it is impossible to do so. This particular usufruct is capable of actuarial valuation.

To apply the maxim that "certainty" is a recognized valuation principle without acknowledging the embodiment of that maxim in section 20.2031-1(b) improperly construes these valuation regulations. To apply the maxim that "certainty" is a recognized valuation principle when there is in fact no established market for the type of property at issue directly violates section 20.2031. To apply the maxim that "certainty" is a recognized valuation principle applicable to this usufruct supplants actuarial valuation under section 20.2031-7, rendering section 20.2031-9 meaningless. The attempt by the IRS to create a vague exception to these regulations on the basis of *post hoc* information asserted to be certain fact violates its own regulation scheme for valuation as well as this Court's opinion in *Ithaca Trust*.

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[7] Rev. Rul. 66-271, 1966-2 C. B. 430.

While at first blush the results of applying the regulatory scheme mandating use of the actuarial table may appear to defy "reason and fact" in the instant case, closer scrutiny reveals the procedure is perfectly equitable. The regulatory scheme hinges on the mathematical logic of the actuarial table. This, as the Fifth Circuit noted in *Miami Beach*, "necessarily deals with probabilities but is *applicable indiscriminately to all individuals*, and incorporates in its statistics the *fortuities of premature death as well as longevity.*" *Miami Beach*, 443 F.2d at 120 (emphasis added). Under this scheme that employs this logic, all "exceptional" cases become unexceptional.

CONCLUSION

The Court of Appeals attempted in its opinion to articulate an exception to *Ithaca Trust* so narrow that it would virtually apply only to the case at hand. However, this decision permits the IRS to continue with a series of decisions creating its own exception to *Ithaca Trust*, one that is so broad as to render that decision virtually meaningless. The time has come to apply *Ithaca Trust* or to face up to the consequences of the fuzzy logic that Justice Holmes found would result from any alternative rule.

The method of valuation found in the actuarial tables is a fair one. As stipulated of record, these tables were based on the 1970 census, which counted all deaths, regardless of cause or age. The data includes instances in which a beneficiary would live far longer than the tables predicted as well as cases such as this one in which the

beneficiary lived a shorter period of time. *United States v. Farr's Executor*, 196 F. 996, 998 (E.D Pa. 1912).

The instant opinion pays lip service to federalism in recognizing the creation of the usufruct in the circumstances here present. But it evades application of substantive state law by departing from ordinary valuation procedures to render the transferred usufruct valueless, as if it had never actually transferred. This evasion is both unfair and unwarranted by the regulations. The granting of a writ of certiorari would be in the interest of justice by maintaining a principled system of law giving due weight to applicable principles reflected in both federal and state law.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS

ESTATE OF Andrew P. CARTER, Through Its Dative Testamentary Executor, Eugene G. TAGGART, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

No. 90-3099.

United States Court of Appeals, Fifth Circuit.

Jan. 11, 1991.

Before POLITZ, WILLIAMS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In this case, we must determine how to value, for purposes of the estate tax credit available under 26 U.S.C. § 2013, a usufruct[1] transferred between persons killed in a common disaster. The taxpayer asserts that the usufruct should be valued in accordance with actuarial tables reflecting the expected lifespan of the transferee. Emphasizing the imminence of the transferee's death at the time he received the usufruct, the government contends that the property interest was worthless. We conclude that a usufruct passed between persons dying in a common

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[1] Louisiana law defines a usufruct as "a real right of limited duration on the property of another." La.Civ.Code art. 535. It is comparable to the common law life estate. *Land v. United States*, 565 F.2d 355, 356 (5th Cir. 1978) (per curiam).

disaster has no value and thus that the taxpayer is entitled to no credit. Accordingly, the district court's judgment is reversed.

I.

An automobile accident claimed the lives of Andrew Carter and his wife Josephine. Because no evidence indicated who had died first or whether their deaths were simultaneous, a presumption arose under Louisiana law that Mrs. Carter died first.[2] Mrs. Carter's will granted her estate in usufruct to Mr. Carter and in naked ownership[3] to the couple's surviving children. Because of the temporal proximity of their deaths, the period of Mr. Carter's usufruct was of exceedingly short duration – if it in fact ever existed.

II.

After the executor of Mr. Carter's estate paid the federal estate tax, he filed a claim for a refund, alleging entitlement to a "tax on prior transfer" (hereinafter TPT) credit under section 2013 of the Internal Revenue Code of

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[2] La.Civ.Code art. 938 provides in pertinent part, "If those who have perished together . . . were above the age of sixty years, the youngest shall be presumed to have survived." Although both Mr. and Mrs. Carter were 67 years of age at the time of their deaths. Mr. Carter was younger by a few months.

[3] Louisiana law provides that "[t]ag [sic] ownership of a thing burdened with a usufruct is designated as naked ownership." La.Civ.Code Art. 478 (1980). Accordingly, naked ownership is analogous to ownership of a vested remainder under the common law.

1986, 26 U.S.C. § 2013 (1989). Section 2013(a) reduces a decedent's estate tax by "all or part of the amount of the Federal estate tax paid with respect to the transfer of property . . . to the decedent by or from a person . . . who died within 10 years before, or within 2 years after, the decedent's death." The TPT credit "bears the same ratio to the estate tax paid . . . with respect to the estate of the transferor as the value of the property transferred bears to the taxable estate of the transferor. . . . " *Id.* § 2013(b).

The credit amount is thus calculated according to the following formula:

$$\frac{\text{TPT credit}}{\text{transferor tax paid}} = \frac{\text{value of property transferred}}{\text{taxable estate of transferor}}$$

Applying the formula to our facts, the TPT credit bears the same ratio to the tax paid by Mrs. Carter's estate as the value of the usufruct bears to the value of Mrs. Carter's taxable estate.

The value of the property transferred (here, the usufruct) is thus critical in calculating the TPT credit. The taxpayer urged the district court to consult the actuarial tables contained in the applicable Internal Revenue Service regulations and accordingly to conclude that the value of the usufruct transferred from Mrs. Carter to Mr. Carter was approximately $1 million. Inserting this amount into the above formula would yield a credit of $292,450.56.

In contrast, the government asserted that when a transferor and transferee die in a common disaster, a usufruct passing between them is valueless. According to the formula, the TPT credit thus would be zero.

Concluding that "no one knew or could have known whether Mr. Carter would survive or not, or how long" at the time he received the usufruct, the court consulted the actuarial tables to value the transferred property.[4] As a consequence, the court granted the taxpayer's motion for summary judgment and awarded the requested refund.

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[4] The taxpayer seizes on the quoted statement in attempting to protect this judgment from *de novo* review. The estate characterizes the declaration as a "finding of fact" subject to reversal only if clearly erroneous. This approach is unavailing. Since the parties stipulated to the relevant facts, the district court did not make any factual findings entitled to deference on appeal. The court's statement did not amount to a finding of fact but rather was a reason in support of its legal conclusion.

The taxpayer commits a similar error in its treatment of *Estate of Wien v. Commissioner*, 441 F.2d 32 (5th Cir. 1971). In that case, we interpreted entirely different valuation regulations and concluded that ownership interests in life insurance policies should have been valued in accordance with procedures outlined in the applicable regulations. In the course of our opinion, we stated that "in the present case, at the moment of Mrs. Wien's death, no one knew or could have known whether Mr. Wien would survive or not." *Id.* at 40. The taxpayer attempts to characterize this as a statement that we are bound to apply in all cases.

We do not read *Wien* so broadly. *Wien* undoubtedly stands for the proposition that in a simultaneous death situation the valuation of ownership interests in life insurance policies must be based upon the interpolated terminal reserve of the policy. However, the court's observation, quoted above, is not a holding that binds us in a non-insurance case.

III.

A.

In reviewing the disposition of a summary judgment motion, we apply the same Fed.R.Civ.P. 56(c) test as did the district court, without deference to its ultimate conclusion. *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir. 1987), *cert. denied*, 484 U.S. 851, 108 S.Ct. 152, 98 L.Ed.2d 107 (1988). Rule 56(c) permits summary judgment where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The parties stipulated to all relevant facts, and the court, interpreting the pertinent provisions of the code and their accompanying regulations, concluded that the taxpayer was entitled to judgment as a matter of law. We review *de novo* the district court's judgment.

B.

Section 2013(d) states that "[t]he value of property transferred to the decedent shall be the value used . . . the purpose of determining the Federal estate tax liability of the estate of the transferor. . . . " The accompanying regulations reiterate this language. *See* 26 C.F.R. § 20.2013-4(a) (1988). However, the regulations set up a specific valuation rule for indeterminate interests such as usufructs:

> If the decedent received a life estate or remainder or other limited interests in property included in the transferor's gross estate, the value of the interest is determined as of the date of the transferor's death on the basis of recognized valuation principles (see especially §§ 20.2031-7 and 20.2031-10).

Id.

Sections 20.2031-7 and 20.2031-10, to which section 20.2013-4(a) refers, contain actuarial tables by which the value of indeterminate interests may be determined. However, section 20.2013-4(a)'s inclusion of the phrase "see especially §§ 20.2031-7 and 20.2031-10" plainly indicates that "recognized valuation principles" *include* but are not *limited to* the use of actuarial tables.[5] Accordingly,

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[5] In *Estate of Lion v. Commissioner*, 438 F.2d 56, 60 (4th Cir. 1971), the court declared as follows: "That the tables may or may not reflect 'recognized valuation principles' is implicit in the use of the phrase *'see especially* § 20.2031-7' (emphasis added), rather than an imperative phrase, for example, 'as determined by § 20.2031-7,' or an expression of like import. The regulations thus leave room for departure from strict application of the tables." The court further stated that recognized valuation principles "may be, but not necessarily are, to employ actuarial and mortality tables." *Id.* at 61.

In applying a similar set of valuation regulations, we stated that "the exclusive use of the mortality tables is not required under all circumstances." *Miami Beach First Nat'l Bank v. United States*, 443 F.2d 116, 120 (5th Cir. 1971). We reached this conclusion in the face of arguably less flexible regulations. In the instant case and in *Lion*, the regulation at issue stated that valuations should be made in accordance with "recognized valuation principles," a somewhat amorphous term capable of broad interpretation. In *Miami Beach*, by way of contrast, we interpreted 26 C.F.R. § 20.2031-7(a), which currently states that "[t]he present value of [indeterminate interests] is computed by the use of Table A in paragraph (f) of this section." Our conclusion that "recognized valuation principles" include more than actuarial tables should be entirely unstartling, especially in light of our conclusion in *Miami Beach*.

neither the statutory nor regulatory language mandates using the actuarial tables in every case.[6]

Unfortunately, this regulation does not identify any "recognized valuation principles" other than the actuarial tables, nor does it indicate when such alternative methods should be used. However, precedents of this

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[6] The taxpayer concedes, as it must, that "recognized valuation principles" does not refer exclusively to the actuarial tables. However, it makes the novel argument that the phrase refers solely to the valuation methods in 26 C.F.R. §§ 20.2031-1 through 20.2031-10. The taxpayer offers this assertion in order to argue ultimately that the actuarial tables *must* be used whenever they *can* be used.

The taxpayer erects an elaborate *in pari materia* interpretation of the valuation regulations that rests upon a shaky foundation. The taxpayer's entire argument in this regard depends upon its initial assumption that the phrase "recognized valuation principles" refers exclusively to §§ 20.2031-1 through 20.2031-10, but the taxpayer offers absolutely no basis upon which such an assumption could be made. In light of both those cases in which the phrase "recognized valuation principles" has been interpreted to include consideration of known facts, *see, e.g., Lion* (specifically interpreting section 20.2013-4(a)'s language), and those in which known facts have been considered, *see e.g., United States v. Provident Trust Co.*, 291 U.S. 272, 54 S.Ct. 389, 78 L.Ed. 793 (1934), the taxpayer's argument is unavailing.

Furthermore, had the regulation's drafters intended "recognized valuation principles" to refer exclusively to §§ 20.2031-1 through 20.2031-10, they easily could have crafted the regulation to reflect such an intent. That they did not is evidence that "recognized valuation principles" goes beyond the valuation methods set forth in those sections. In short, then, because the foundation of the taxpayer's argument does not withstand scrutiny, neither does the argument as a whole.

court and others indicate that consideration of facts known at the time of the transferor's death (i.e., at the time of the transfer) is a "recognized valuation principle"[7] and that this case presents a situation in which that method should have been employed by the district court.

For example, in *Lion*, a case identical in all relevant respects to this one, the Fourth Circuit held that the district court properly considered the simultaneous deaths of the transferor and transferee and concluded that this fact rendered the transferee's life estate worthless for purposes of the TPT credit. 438 F.2d at 62. The court observed that "[w]hile the regulations indicate that *ordinarily* the value of a life estate is to be determined by the use of actuarial tables, the use of tables is subject to the underlying premise that what is sought to be achieved is value 'as of the date of the transferor's death on the basis of recognized valuation principles.' " *Id.* at 60 (emphasis in original).

Similarly, in *United States v. Provident Trust Co.*, 291 U.S. 272, 54 S.Ct. 389, 78 L.Ed. 793 (1934), the Court held that in determining the value of a charitable remainder contingent upon the life tenant's not having any issue, the fact that the life tenant had undergone a hysterectomy could be considered. Furthermore, in *Miami Beach* we held that in determining the value of charitable remainders, "evidence regarding the actual life expectancy of a

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[7] *See Provident Trust; Miami Beach*, 443 F.2d at 119-20; *Estate of Marks v. Commissioner*, 94 T.C. 720 (1990); *Lion*, 438 F.2d at 62; *Estate of Fabric, 83 T.C. 932, 943 (1984); Estate of Hoelzel*, 28 T.C. 384 (1957); *Estate of Butler v. Commissioner*, 18 T.C. 914 (1952); *Estate of Jennings v. Commissioner*, 10 T.C. 323 (1948).

life tenant" may be considered. 443 F.2d at 119.[8] Thus, the phrase "recognized valuation principles" includes examination of facts known about the transferee at the time of the transferor's death.

Nonetheless, simply because an alternative valuation principle exists does not necessarily mean that it should be employed in this case. However, relevant caselaw indicates that this approach to valuation may be employed in exceptional situations. For example, in *Lion* the court observed that "unusual circumstances" have prompted courts to eschew mortality tables in favor of examining known facts when determining the value of indeterminate interests. 438 F.2d at 60.

The *Lion* court further noted that numerous Tax Court decisions have employed alternative valuation methods "where there is reasonable certainty that use of the tables would violate reason and fact." *Id.* at 61 (citations omitted). We held similarly in *Miami Beach* that employing valuation procedures other than actuarial tables should occur in "exceptional cases." 443 F.2d at 120 (citation omitted).

The paradigm "unusual circumstance" in which mortality tables have not been employed is the simultaneous death of the transferor and transferee. In *Lion*, the court observed that the transferee and transferor died at the same time and held that "the only reasonable conclusion

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[8] In *Miami Beach* we ultimately held that the mortality tables should have been employed because the evidence did not demonstrate that the life tenant's death was imminent. 443 F.2d at 120.

is that [the] life estate was valueless at the instant of its creation and destruction." 438 F.2d at 62. *See also Estate of Marks v. Commissioner*, 94 T.C. 720 (1990). That same exceptional situation exists in this case, and we agree with the Fourth Circuit's conclusion.

The taxpayer seeks to avoid application of this alternative recognized valuation principle by arguing that it was not "known" at the time of Mrs. Carter's death that Mr. Carter would die. It analogizes this case to *Ithaca Trust Co. v. United States*, 279 U.S. 151, 49 S.Ct. 291, 73 L.Ed. 647 (1929), in which the Court held that in determining the value of a life estate, the fact that the life tenant died six months after receiving the property should not be considered.

This case is unlike *Ithaca Trust*. In this case, it was known at the time of the transfer that Mr. Carter was already dead or would soon die. At the moment of Mrs. Carter's death, Mr. Carter's death was not an "uncertain probability," as was the death in *Ithaca Trust*, where the life tenant died six months after the transfer. In fact, it is only by operation of the fiction established by state law (article 938) that we deem Mr. Carter to have survived Mrs. Carter for a few seconds or minutes. The truth – which will never be known – could just as likely be that he predeceased her or that they died simultaneously.

The taxpayer further contends that policy considerations mandate application of the actuarial tables. It argues that the tables contemplate situations in which the holder of the usufruct dies much sooner than expected and that thus the tables should be applied in all circumstances. Although there is some merit to this argument, it

ignores the fact that our task is to interpret the language of the regulation.

Section 20.2013-4(a) demands that we value the usufruct in accordance with "recognized valuation principles"; this language indicates that there are situations in which the value of the interest is calculated not by resort to the tables, but instead according to some other method. Taking the taxpayer's policy argument to its logical conclusion would require our applying the tables in every case, something plainly not contemplated by the regulation.

Here, we opt instead to apply the maxim that certainty should be deemed a "recognized valuation principle." Just as it would be foolish to "predict" yesterday's weather, there is no reason to use uncertain valuation principles – regardless of how sophisticated – to "value" something for which a value in fact already has been indelibly fixed by the course of events.

The taxpayer also argues that applying the tables in all cases would promote the regulatory goals of ease and uniformity. Although this is certainly true, we fail to see how our conclusion undermines those goals. We limit our holding to those situations in which the transferee and transferor of an indeterminate interest such as a usufruct die in a common disaster. Because in this situation it is known with certainty that the transferee will die (or in fact may already have died), there is no need for inquiries into just how much the particular decedent's lifespan varies from the statistical norm, and thus valuation of this variety of property interest will not be unduly complicated.

IV.

Because the district court failed to employ the recognized valuation principle appropriate to this case, we REVERSE its judgment and RENDER judgment in the government's favor.

OPINION AND JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 89-1878

ESTATE OF ANDREW P. CARTER,
Through its Dative Testamentary
Executor, Eugene C. Taggart

versus

UNITED STATES OF AMERICA

MEMORANDUM OPINION
Filed Dec. 14 1989

This matter was submitted on the motion of plaintiff, the Estate of Andrew P. Carter, Through its Dative Testamentary Executor, Eugene C. Taggart (hereinafter "Taxpayer"), for summary judgment and the cross motion of defendant, United States of America (hereinafter "USA") for summary judgment.

I. FACTS

The relevant facts have been stipulated, (Record Document No. 9). On May 23, 1987, Andrew Poole Carter and Josephine Melba Dodd Carter, husband and wife, were involved in a fatal automobile accident in which both individuals died at the accident scene. There is no evidence which would indicate which of these individuals died first. However, Mrs. Carter was a few months older than Mr. Carter and by virtue of the Louisiana doctrine of commorientes found in Article 938 of the Louisiana Civil Code, Mr. Carter is deemed to have survived Mrs. Carter. Following their deaths, successions were opened for each

in the Twenty-Second Judicial District Court for the Parish of St. Tammany and their olographic wills were probated. As a result of the provisions in Mrs. Carter's will and an Act of Renunciation and Disclaimer filed on behalf of Mr. Carter's estate, property in Mrs. Carter's estate was inherited in usufruct to Mr. Carter, and in naked ownership to their surviving children.

In February of 1988, Eugene C. Taggart, dative testamentary executor of both of the estates filed requests for extension of file deadlines for the final estate tax returns with the Internal Revenue Service (hereinafter "IRS") and paid an estimated tax on each estate. On July 1, 1988, final federal estate tax returns were filed for each estate and because the final tax was less than the amount estimated and previously paid, a refund of the overpayment was sought from and paid by the IRS to both estates.

On October 20, 1988, the executor for Mr. Carter's estate delivered the taxpayer's claim for a refund of $292,450.56 in federal estate tax previously paid to the IRS. The executor contended that the taxpayer was entitled to a "tax on prior transfer" (hereinafter "TPT") credit under 26 U. S. C. § 2013. No refund had been made to the taxpayer pursuant to this claim.

II. LAW AND ANALYSIS

Section 2013 of the Internal Revenue Code provides for a credit "against federal estate tax imposed on the present decedent's estate for federal estate tax paid on the transfer to the present decedent within ten years before, or within two years after, the present decedent's death."

The TPT credit applies to any beneficial transfer in the property received by the transferee. 26 U. S. C. §20.2013-5. The TPT credit does apply to a Louisiana usufruct. Rev. RW 66-511, 1966-2 Cum. Bell. 420 [sic]. The Code does not set forth the manner for computing the value of limited interest in property, such as a usufruct.

The taxpayer's position is that all of the prerequisites of the statute have been met and it is entitled to the TPT credit. The taxpayer further contends that the credit must be calculated by finding the actuarial life expectancy as determined from Section 20.2013-7's mortality tables. The government concedes that the mortality tables are generally applied, however, in this instance the government contends that there is an exception to this general rule posed by the principles enunciated in *Estate of Lion v. Commissioner*, 438 F. 2d 56 (4th Cir. 1971), *cert. denied*, 404 U. S. 870, 92 S. Ct. 52, 30 L. Ed. 2d 114 (1971). In *Lion*, a husband and wife were simultaneously killed in an air plane crash. The Fourth Circuit affirmed the Tax Court's prior holding that the wife's life estate had no value and thus was not entitled to a TPT credit under Section 2013.

The purpose of 26 U. S. C. §2013 is to prevent the diminution of an estate by the imposition of successive tax on the same property. To achieve this purpose, the statute affords a credit to the transferee's estate. The government does not challenge the estate's right to this credit. The sole issue pending in this matter is the value of the usufruct to Mr. Carter at Mrs. Carter's death.

In 26 U. S. C. §2013(a) and 26 U. S. C. §7805(a), the Secretary of the Treasury had promulgated regulations to

provide criteria for the valuation of property for estate tax purposes.

Section 20.2013-4 states:

> " . . . the value of the property transferred to the decedent is the value at which the property was included in the transferor's gross estate. . . . If the decedent received a life estate or remainder or other limited interests in property included in the transferor's gross estate, the value of the interest is determined as of the date of the transferor's death on the basis of recognized valuation principles. (See especially §§20.2031-7 and 20.2031.10).

Section 20.2031-7 establishes tables of ages with corresponding factors to compute the present value of annuities, life estates, terms of years, remainders and revision [sic]. Since this case involves a death following November 30, 1983, Section 2031-7 applies, Subsection (a)(2) states:

> The present value of an annuity, life estate, remainder or reversion determined under this section which is dependent on the continuation or termination of the life of one person is computed by use of Table A in paragraph (f) of this Section.

Subsection (f) provides that "the following tables shall be used in application of the provision in this section." The regulations appear to conflict these sections with Section 20.2031-1(b) concerning valuation of estates which provides in part that "all relevant facts and elements of value as of the applicable valuation date shall be considered in every case."

The Fifth Circuit has also rendered two somewhat conflicting opinions in this area. The Court states in *The*

Miami Beach First National Bank v. The United States, 443 F.2d 116, 120 (5th Cir. 1971) that:

> "It is only where established facts are sufficient to justify a departure from the Regulations that exceptions are allowed. Such exceptions have been recognized, for instance, where the death of the life tenant is imminent and predictable. . . . " Id at 120.

The Court then cites two cases to illustrate its position, *The Estate of Nellie H. Jennings*, 10 T. C. 323 (1948) where upon the decedent's death, the life tenant was helpless with complete memory loss and almost total paralysis which ended in the tenant's death two months after the decedent's death. The Court also cites *Estate of John P. Hoelzel*, 28 T. C. 384 (1957) where the beneficiary at the time of the decedent's death was suffering from incurable and inoperable cancer. The Court states "in such exceptional cases, the value of a remainder interest may be determined with reference to the actual physical condition of the beneficiary on the date of the decedent's death rather by the exclusive use of mortality tables." Id.

However, the Court's holding in this matter was that the table provided by the Regulations "which necessarily deals with probabilities, but is applicable indiscriminately to all individuals and incorporates in its statistics the fortuities of premature death as well as longevity." Id.

Another Fifth Circuit case with an analogus [sic] holding is *Estate of Wien*, 441 F. 2d 32 (5th Cir. 1971), where a husband and wife were simultaneously killed in an airplane crash. Although in this case the Court focused on valuation in terms of life insurance policies, the Court

stated in terms of valuing the owner's property interest that:

> We think that the principles of estate taxiation [sic] preclude consideration of such facts as the actual state of the insured's health or peril in valuing the owner's property interest. Indeed it would bring virtual disaster upon the integrity of estate taxation if the value of an ownership interest fluctuated with the probable longevity of the insured. Any valuation method depending upon such an uncertain measure as the day-by-day health of an individual insured would be impossible to enforce accurately. *Old Kent Bank and Turst [sic] Co. v. United States* 6 Cir. 1970, 430 F. 2d 392. There are simply no actuarial computations which can be applied to an individual illness or accidential [sic] circumstances [sic] which will accurately predict the probability of death. For this reason the standard mortality tables on which the interpolated terminal reserve is based, rather than ad hoc medical prognosis, have always been the norm for estate tax valuations. [Yet] here because there is a common disaster involved both the Commissioner and the taxpayers suggest that we depart from the norm and value the policy on the basis of the individual insured's probability of death. We think considerations of this sort are as unmanageable when a a [sic] common disaster is involved as they are in the ordinary case.
>
> It is settled that the estate tax attached [sic] to the value of the property at the instance of the deceased's death. *United States v. Land*, 5 Cir. 1962, 303 F. 2d 170, *cert. denied*, 371 U. S. 862, 83 S. Ct. 121, 9 L. Ed. 2d 100. It is also clear that in the present case, at the moment of Mrs. Wien's death, no one knew or could have known whether Mrs. Wrin [sic] would have survived or not. There are no actuarial figures to apply to

> this situation. Both the Commissioner and the taxpayers of necessity took a post mortem look and determined that the insured did die, a fact which no buyer at the instant of the owner's death could have known. This method of valuation flies in the fact [sic] of established precepts of appraisal based upon actuarial life expectancies at the instant of death as reflected by the interpolated terminal reserve. Before we would sanction such ad hominem determinations of valuation based on post mortem peeks at individual mortality, congressional authorization would be necessary.

In this matter, no one knew or could have known whether Mr. Carter would survive or not, or how long. As the Supreme Court stated in *Ithaca Trust Co. v. United States*, 279 U. S. 151, 155, 49 S. Ct. 291, 292 (1929):

> Tempting as it is to correct uncertain probabilities by now certain fact, we are of the opinion that it cannot be done but that the value of the life interest must be estimated by the mortality tables.

The Congressional purpose in creating Section 2013 was to provide the transferee with an estate tax credit to prevent diminuation [sic] of estates. In the pending matter, the property transferred in usufruct was already fully taxed in the transferee's estate. The statute explicity [sic] contemplates a credit for the transferee's estate that reflects the value of the limited interest transferred. The valuation of that limited interest is established in the regulations.

Judgment will be entered accordingly.

New Orleans, Louisiana, December 13, 1989.

/s/ Marcel Livaudais
MARCEL LIVAUDAIS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 89-1878

ESTATE OF ANDREW P. CARTER,
Through its Dative Testamentary
Executor, Eugene C. Taggart

versus

UNITED STATES OF AMERICA

JUDGMENT
Filed Dec. 14 1989

Considering the record, the motions and memoranda of counsel, and for the reasons assigned;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, the Estate of Andrew P. Carter, Through its Dative Testamentary Executor, Eugene C. Taggart, and against defendant, United States of America, in the full and true sum of $292,450.56, with interest as provided by law from date of judicial demand, and costs.

New Orleans, Louisiana, December 13, 1989.

/s/ Marcel Livaudais
MARCEL LIVAUDAIS, JR.
United States District Judge

DENIAL OF REHEARING

[929 F.2d 699]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3099

ESTATE OF ANDREW P. CARTER, Through its Dative Testamentary Executor, Eugene G. Taggart,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 1/11/91, 5 Cir., 1991, 921 F.2d 63)

(March 15, 1991)

Before POLITZ, WILLIAMS and SMITH, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it. (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JERRY E. SMITH
United States
Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-6

RELEVANT STATUTORY EXCERPTS:

26 U.S.C. § 2013. Credit for tax on prior transfers

(a) General rule. – The tax imposed by section 2001 shall be credited with all or a part of the amount of the Federal estate tax paid with respect to the transfer of property . . . to the decedent by or from a person (herein designated as "transferor") who died within 10 years before, or within 2 years after, the decedent's death. . . .

* * *

(d) Valuation of property transferred. – The value of property transferred to the decedent shall be the value used for the purpose of determining the Federal estate tax liability of the estate of the transferor. . . .

* * *

(e) Property defined. For purposes of this section, the term "property" includes any beneficial interest in property, including a general power of appointment (as defined in section 2041).

* * *

EXCERPTS FROM RELEVANT REGULATIONS

26 C.F.R. § 20.2013-4. Valuation of property transferred

(a) For purposes of section 2013 and §§ 20.2013-1 to 20.2013-6, the value of the property transferred to the decedent is the value at which the property was included in the transferor's gross estate for the purpose of the Federal estate tax (see sections 2031, 2032, 2103, and 2107, and the regulations thereunder) reduced as indicated in paragraph (b) of this section. If the decedent received a life estate or remainder or other limited interests in property included in the transferor's gross estate, the value of the interest is determined as of the date of the transferor's death on the basis of recognized valuation principles (see especially §§ 20.2031-7 and 20.2031-10). The application of this paragraph may be illustrated by the following examples:

Example (1). A died on January 1, 1953, leaving Blackacre to B. The property was included in A's gross estate at a value of $100,000. On January 1, 1955, B sold Blackacre to C for $150,000, B died on February 1, 1955. For purposes of computing the credit against the tax imposed on B's estate, the value of the property transferred to B is $100,000.

Example (2). A died on January 1, 1953, leaving Blackacre to B for life and, upon B's death, remainder to C. At the time of A's death, B was 56 years of age. The property was included in A's gross estate at a value of $100,000. The part of that value attributable to the life estate is $44,688 (see paragraph (c) of § 20.2031-7), and the part of that value attributable to the remainder is $55,312 (see paragraph (d) of § 20.2031-7), B died on January 1, 1955, and C died on January 1, 1956. For purposes of computing the credit against the tax imposed on B's estate, the value of the property transferred to B is $44,688.

For purposes of computing the credit against the tax imposed on C's estate, the value of the property transferred to C is $55,312.

* * *

26 C.F.R. § 20.2031-1. Definition of gross estate; valuation of property

(a) *Definition of gross estate.* Except as otherwise provided in this paragraph the value of the gross estate of a decedent who was a citizen or resident of the United States at the time of his death is the total value of the interests described in sections 2033 through 2044. The gross estate of a decedent who died before October 17, 1962, does not include real property situated outside the United States (as defined in paragraph (b)(1) of § 20.0-1). Except as provided in paragraph (c) of this section (relating to the estates of decedents dying after October 16, 1962, and before July 1, 1964), in the case of a decedent dying after October 16, 1962, real property situated outside the United States which comes within the scope of sections 2033 through 2044 is included in the gross estate to the same extent as any other property coming within the scope of those sections. In arriving at the value of the gross estate the interests described in sections 2033 through 2044 are valued as described in this section, §§ 20.2031-2 through 20.2031-9 and § 20.2032-1. The contents of sections 2033 through 2044 are, in general, as follows:

(1) Sections 2033 and 2034 are concerned mainly with interests in property passing through the decedent's probate estate. Section 2033 includes in the decedent's gross estate any interest that the decedent had in property at the time of his death. Section 2034 provides that any interest of the decedent's surviving spouse in

the decedent's property, such as dower or curtesy, does not prevent the inclusion of such property in the decedent's gross estate.

(2) Sections 2035 through 2038 deal with interests in property transferred by the decedent during his life under such circumstances as to bring the interests within the decedent's gross estate. Section 2035 includes in the decedent's gross estate property transferred in contemplation of death, even though the decedent had not interest in, or control over, the property at the time of his death. Section 2036 provides for the inclusion of transferred property with respect to which the decedent retained the income or the power to designate who shall enjoy the income. Section 2037 includes in the decedent's gross estate certain transfers under which the beneficial enjoyment of the property could be obtained only by surviving the decedent. Section 2038 provides for the inclusion of transferred property if the decedent had at the time of his death the power to change the beneficial enjoyment of the property. It should be noted that there is considerable overlap in the application of sections 2036 through 2038 with respect to reserved powers, so that transferred property may be includible in the decedent's gross estate in varying degrees under more than one of those sections.

(3) Sections 2039 through 2042 deal with special kinds of property and powers. Sections 2039 and 2040 concern annuities and jointly held property respectively. Section 2041 deals with powers held by the decedent over the beneficial enjoyment of property not originating with the decedent. Section 2042 concerns insurance under policies on the life of the decedent.

(4) Section 2043 concerns the sufficiency of consideration for transfers made by the decedent during his life. This has a bearing on the amount to be included in the decedent's gross estate under sections 2035 through 2038, and 2041. Section 2044 deals with retroactivity.

(b) *Valuation of property in general.* The value of every item of property includible in a decedent's gross estate under sections 2031 through 2044 is its fair market value at the time of the decedent's death, except that if the executor elects the alternate valuation method under section 2032, it is the fair market value thereof at the date, and with the adjustments, prescribed in that section. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate. Thus, in the case of an item of property includible in the decedent's gross estate, which is generally obtained by the public in the retail market, the fair market value of such an item of property is the price at which the item or a comparable item would be sold at retail. For example, the fair market value of an automobile (an article generally obtained by the public in the retail market) includible in the decedent's gross estate is the price for which an automobile of the same or approximately the same description, make, model, age, condition, etc., could be purchased by a member of the

general public and not the price for which the particular automobile of the decedent would be purchased by a dealer in used automobiles. Examples of items of property which are generally sold to the public at retail may be found in §§ 20.2031-6 and 20.2031-8. The value is generally to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of property. For example, in the case of shares of stock or bonds, such unit of property is generally a share of stock or a bond. Livestock, farm machinery, harvested and growing crops must generally be itemized and the value of each item separately returned. Property shall not be returned at the value at which it is assessed for local tax purposes unless that value represents the fair market value as of the applicable valuation date. All relevant facts and elements of value as of the applicable valuation date shall be considered in every case. The value of items of property which were held by the decedent for sale in the course of a business generally should be reflected in the value of the business. For valuation of interests in businesses, see § 20.2031-3. See § 20.2031-2 and §§ 20.2031-4 through 20.2031-8 for further information concerning the valuation of other particular kinds of property. For certain circumstances under which the sale of an item of property at a price below its fair market value may result in a deduction for the estate, see paragraph (d)(2) of § 20.2053-3.

* * *

26 C.F.R. § 20.2031-7. Valuation of annuities, life estates, terms for years, remainders, and reversions for estates of decedents dying after November 30, 1983

(a) *In general.* (1) Except as otherwise provided in this paragraph (a)(1), for estates of

decedents dying after November 30, 1983, the fair market value of annuities, life estates, terms for years, remainders, and reversions is their present value determined under this section. . . .

(2) The present value of an annuity, life estate, remainder, or reversion determined under this section which is dependent on the continuation or termination of the life of one person is computed by the use of Table A in paragraph (f) of this section. . . .

* * *

(c) *Life estates and terms for years.* If the interest to be valued is the right of a person for his or her life, or for the life of another person, to receive the income of certain property or to use nonincome-producing property, the value of the interest is the value of the property multiplied by the figure in column 3 of Table A opposite the number of years nearest to the actual age of the measuring life. . . .

* * *

(f) *Tables.* The following tables shall be used in the application of the provisions of this section. . . .

* * *

26 C.F.R. § 20.2031-9. Valuation of other property

The valuation of any property not specifically described in §§ 20.2031-2 to 20.2031-8 is made in accordance with the general principles set forth in § 20.2031-1. For example, a future interest in property not subject to valuation in accordance with the actuarial principles set forth in § 20.2031-7 is to be valued in accordance with the general principles set forth in § 20.2031-1.

COMPARISON OF 1956 AND 1958 REGULATIONS

Proposed section 20.2013-4(a), 21 Fed. Reg. 7857, 7858 (Oct. 16, 1956)

§ 20.2013-4 Valuation of property transferred. (a) For purposes of section 2013 and §§ 20.2013-1 to 20.2013-6, inclusive, the value of the property transferred to the decedent is the value at which such property was included in the transferor's gross estate for the purpose of the Federal estate tax (see sections 2031, 2032, and the regulations thereunder) reduced as indicated in paragraph (b) of this section. If the decedent received a life estate or remainder or other limited interest in property included in the transferor's gross estate, the value of the interest is determined as of the date of the transferor's death *on the basis of recognized actuarial principles (see § 20.2031-7). If the interest cannot be so valued, it is considered for purposes of section 2013 to have no value.* The application of this paragraph may be illustrated by the following examples: [emphasis added]

* * *

Final section 20.2013-4(a), 23 Fed. Reg. 4536, 4537 (June 24, 1958)

§ 20.2013-4 Valuation of property transferred. (a) For purposes of section 2013 and §§ 20.2013-1 to 20.2013-6, the value of the property transferred to the decedent is the value at which such property was included in the transferor's gross estate for the purpose of the Federal estate tax (see sections 2031, 2032, and the regulations thereunder) reduced as indicated in paragraph (b) of this section. If the decedent received a life estate or remainder or other limited interest in property included in the transferor's gross estate, the value of the interest is determined as of the date of the transferor's death *on the basis*

of recognized valuation principles (see especially § 20.2031-7). The application of this paragraph may be illustrated by the following examples: [emphasis added]

* * *

Proposed section 20.2031-9, 21 Fed. Reg. 7857, 7870 (Oct. 16, 1956)

§ 20.2031-9. *Valuation of other property.* The valuation of any property not specifically described in §§ 20.2031-2 to 20.2031-8, inclusive, is made in accordance with the general principles set forth in § 20.2031-1.

Final section 20.2031-9, 23 Fed. Reg. 4536, 4549 (June 24, 1958)

§ 20.2031-9. *Valuation of other property.* The valuation of any property not specifically described in §§ 20.2031-2 to 20.2031-8 is made in accordance with the general principles set forth in § 20.2031-1. *For example, a future interest in property not subject to valuation in accordance with the actuarial principles set forth in § 20.2031-7 is to be valued in accordance with the general principles set forth in § 20.2031-1.* [emphasis added]